Supreme Court of the United States.

October Term, 1902.

George H. Earle, Jr., Receiver of the Chestnut Street National Bank, Plaintiff in Error,

vs.

Susan Carson, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAPER BOOK FOR DEFENDANT IN ERROR.

RICHARD C. DALE,
For the Defendant in Error.

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COUNTER STATEMENT.

This action was brought by the plaintiff, as Receiver of the Chestnut Street National Bank, to recover an assessment of $1000, being one hundred per cent. upon ten shares of the capital stock of the bank, of which, by the stock register of the bank, the defendant was the apparent owner when the bank was closed, by order of the Comptroller of the Currency, on December 23d, 1897. Similar actions were brought against the defendant's brother, Hampton L. Carson, and her sister, Anne C. Carson. The cases were tried together, and resulted in a verdict for the defendants.

The defense was that the defendant was not the owner of

the stock at the time of the closing of the bank, but that the same had been sold at public auction in good faith on December 2d, 1897, and the proper officers of the bank had been requested to transfer the same to the purchaser. By the failure of the officers of the bank to make transfer in accordance with the request, which fact was unknown to the defendant, her name continued upon the stock register when it should have been removed.

Upon the trial the following facts appeared: Henry Carson, an uncle of the defendant, had been the holder of a considerable block of stock in the Chestnut Street National Bank prior to his death, in July, 1896. By his will he divided his estate among his nephews and nieces, of whom the defendant was one. In the distribution of that estate the defendant was allotted ten shares of this bank stock, and the same was transferred into her name by the executors of Henry Carson's estate, in September, 1897. In November, 1897, the defendant's brother, Hampton L. Carson, who had himself received ten shares of the same stock in the distribution of the estate, concluded to sell his shares, and having so determined, advised his sisters of the fact, and they concluded to do as he did. Mr. Carson's statement of the circumstances which induced him to sell the shares was as follows:—

> "I always had a feeling against holding stock in a National Bank, largely, I think, owing to the fact that I practice pretty actively at the bar and have defended people; but I think that which called my attention specifically to it was the fact that I had a conversation with Mr. Rhawn, I think the president of the Bank of the Republic, which had been going out and winding up, and he stated that there was no money for the smaller banks, and it was going out of business."

Mr. Carson further testified that the sole motive which induced the sale was to make a change of investment, and that he had no thought or suspicion that the Chestnut Street Bank was insolvent or in any trouble; that his feeling against holding bank stock was general as to all national bank stock, and not particular as to this bank.

The defendant having determined to sell her shares, placed them, in the month of November, 1897, in the hands of Townsend Whelen & Co., bankers and brokers, for sale. Townsend Whelen & Co. placed the shares for sale with M. Thomas & Son, auctioneers, who, on December 2d, 1897, sold these shares, with others, at public auction for the price of $100 per share, being the par value thereof, to a purchaser whose name was not disclosed at the time of sale, but who, in fact, the testimony in the case showed, was William M. Singerly, at that time president of the Chestnut Street National Bank. Upon the day following the sale, Maguire, the cashier of M. Thomas & Son, took the certificate of stock representing the defendant's shares to the bank, together with a duly executed bill of sale and power of attorney, and handed the documents to William Steele, cashier of the Chestnut Street National bank, at his desk in the bank building, and requested him, as cashier, to cause a transfer to be made on the books of the bank. The cashier stated he would, but failed to do so, and the shares remained apparently untransferred until the bank was closed by order of the Comptroller of the Currency on December 23d, 1897. The evidence was, that neither the defendant nor the auctioneer had any knowledge of the fact that Mr. Singerly was the purchaser. The bid on the auction book was signed in the name of William Steele, who bought these shares, as he often did other shares, for undisclosed principals. There was evidence that the due-bill given to the auctioneer in payment for the purchase price was issued by the bank to Mr. Singerly out of the moneys of the bank, and that he had never repaid the amount, and that the cashier placed the certificate of stock, with the receipted bill of the auctioneer for the price paid, in the cash drawer of the bank as a memorandum of the cash taken to pay for the stock, where they were found by the Receiver after his appointment.

The court submitted the case to the jury, substantially leaving to the jury two questions:—

1. Was the sale by the defendant of her shares made in good faith, without knowledge or suspicion of the impending insolvency of the bank?

2. Did the defendant do all which reasonably a stockholder should do to procure a transfer of the shares which were *bona fide* sold to a purchaser?

By the verdict of the jury both of these questions were resolved in favor of the defendant, and the general verdict may be treated as equivalent to an affirmative answer to both of these propositions.

The plaintiff has, *inter alia*, assigned for error the action of the court in declining to admit evidence offered in rebuttal by the plaintiff to the effect that on December 2d, 1897, when the shares were sold, the bank in fact was insolvent, and Mr. Singerly, the transferee, was insolvent. This offer was objected to by the defendant unless coupled with the further offer to prove knowledge on the part of the defendant of such insolvency, and the objection thus made was sustained.

The principal question raised is whether a stockholder, who in good faith has sold and transferred his shares, or done that which is equivalent to an actual transfer, continues liable, because the condition of the bank, which eventually resulted in the closing of its doors, did not differ at the time of such transfer from the condition as it existed when the Comptroller did close it; and also whether the vendor of bank stock warrants the solvency of his transferee, even though at the time when the transfer was made such transferee was supposed to to be a man of large wealth. This question will be discussed in the brief of argument.

BRIEF OF ARGUMENT.

The verdict of the jury established two propositions of fact in the cause:—

(*a.*) That the defendants sold their shares in the Chestnut Street National Bank on December 2d, 1897, in good faith, without knowledge or suspicion of the impending failure of the bank.

(*b.*) That the defendants did all which a reasonable person would do to procure upon the registry book of the bank the actual transfer of the shares to the purchaser.

This verdict was rendered by the jury after as favorable a charge as the plaintiff was entitled to under the law. The court stated the law of the case in this well-digested proposition:—

> "The question, therefore, in this case is, whether Mr. Carson was a stockholder at the time at which there is no question he must have been a stockholder, in order that he should have incurred this statutory liability; and, as I have understood counsel, there is no question about that date, namely, that he must have been a stockholder, in order to have incurred this responsibility, upon December 23d, 1897. * * *" (Record, page 46.)

Having stated the history of the defendants' acquisition of their shares, the court proceeded:—

> "They became stockholders and accepted the position of stockholders, subject to all the liability which resulted from the acceptance of that position. The real question, then, is as to whether they divested themselves of that ownership of the stock, and divested themselves of it so that under the evidence and circumstances of this case the liability here sought to be fixed upon them ceased to exist. (Record, page 46.)

* * * * * * *

> "I do understand that the law requires that in order to be relieved of liability as a stockholder, a stockholder who makes sale of his stock shall, and must, do all, in order to escape liability, that a reasonable man might and would do who in good faith sold his stock and wished it to be transferred on the books of the company. (Record, page 47.)

* * * * * * *

> "The law, as the court understands it and gives it to you, is this, that the stockholder in a National bank, however he may have derived his stock, has in general a right to sell it, and if he is moved to sell it because he is unwilling to hold a stock to which such a liability may attach, that reason for selling it is not one that prevents his being

relieved by such a sale from the liability. But if his design, if his purpose, is, with a distinct knowledge of impending insolvency of the bank, or if he has circumstances from which he infers that this liability is about to become a positive, fixed liability, and as a mere subterfuge, or, not to use so strong a word, if for the purpose of escaping a fixed liability, which he perceives or has reason to suppose is about to occur, he relieves himself or seeks to relieve himself by a sale of his stock, the sale will not avail him." (Record, page 49.)

These quotations show how clearly the minds of the jury were directed to a consideration of the real questions in the case, and the jury by its verdict decided the questions of fact in favor of the defendants.

The views expressed in the charge of the court below are in entire harmony with the current of Federal authority.

In Earle *vs.* Coyle, 95 Fed. Reporter, 99, and 97 Fed. Rep., 410, the Circuit Court of Appeals for the Third Circuit affirmed the decision of McPherson, J., sitting in the Circuit Court, in a case arising out of the failure of this same bank, under circumstances very similar to those of the present case. Earle *vs.* Coyle was heard upon a case stated. Its only difference as to the facts was that there was a longer lapse of time between the sale and the failure of the bank than that which existed in the present case; but the principles of law controlling the case are the same. McPherson, J., in the opinion filed in the Circuit Court, said:—

"Upon these facts I am of opinion that judgment must be entered in favor of the defendant. The decision of the Supreme Court in Whitney *vs.* Butler, 118 U. S., 655, 7 Sup. Ct., 61, seems to be controlling. In that case a stockholder sold his shares at auction, and the auctioneer delivered to the purchaser the certificate therefor, with a power of attorney to transfer, duly executed in blank. The purchaser paid the auctioneer for the shares, and the auctioneer delivered the money to the stockholder. No

formal transfer of the shares was made upon the books of the bank. The stockholder did not know who the purchaser was, or that the transfer had not been formally made, and had no reason to suppose that the duty to transfer had been neglected. Thus far the facts of the case now before us are identical with the facts thus stated. In Whitney *vs.* Butler, however, the purchaser was a broker that had been employed by the president of the bank to buy the stock for a customer. In the present case the purchaser was the cashier of the bank, and was himself one of its transfer officers. In both cases the certificate and the power of attorney were delivered to a transfer officer, in order that the proper entries might be made upon the books. In Whitney *vs.* Butler the certificate was delivered to the president, although it was known that he was not the purchaser; but the Supreme Court held that as the other requirements of the by-laws had been complied with, the seller had done all that he was required to do, and was not bound to see that the transfer was actually made upon the books. In the case before us the cashier, who was equally with the president an agent to supervise the transfer of stock, was also the purchaser. He was the person to whom the stock was sold by the auctioneer; and, although the auctioneer mistakenly supposed that the purchase was being made on behalf of the president of the bank, this gratuitous supposition is of no weight in the determination of the controversy. In reality the cashier was doing precisely what the apparent facts of the transaction indicated. He was buying the stock for himself, and was paying for it with his own money. When, therefore, the certificate was delivered to him, with a power of attorney, properly signed in blank, the seller had done everything in his power to do, except that he did not insist upon seeing the actual entries made in the transfer books of the bank."

And in the opinion of Acheson, C. J., in the Circuit Court of Appeals, the facts were said to bring the case within the

rule of Whitney *vs.* Butler, 118 U. S., 655, as distinguished from Richmond *vs.* Irons, 121 U. S., 27:—

> "As to the controlling facts, this case differs as much from Richmond *vs.* Irons, 121 U. S., 27, 7 Sup. Ct., 802, as that case differs from Whitney *vs.* Butler. The difference between these two cited cases appears in the following quotation from the opinion of the Supreme Court in Richmond *vs.* Irons, where, speaking of that case, the court said:—
>
> > "'The case is not within the rule laid down in Whitney *vs.* Butler, 118 U. S., 655, 5 Sup. Ct., 61. Here there is no proof, as there was in that case, of the delivery of the certificate to the bank, and a power of attorney authorizing its transfer, with a request to do so, made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee.'
>
> "Here it is conceded that the delivery was to Steele, 'as cashier.'"

The testimony of the witness Maguire, the auctioneers' clerk, in the present case is uncontradicted, that the certificate with the power of attorney to transfer was delivered to Steele, the cashier of the bank, at the office of the bank, with an express direction to make the transfer to the purchaser. (See Record, page 42, testimony Edward L. Maguire):—

> "A. I took the certificate and powers, together with the bill, to Mr. Steele, who was cashier of the Chestnut Street Bank, and who was the purchaser of these shares, delivered the certificates and the bill, received a bank duebill in payment of the bill, and at that time I said to Mr. Steele, 'I wish you would be sure to transfer these shares at once.'
>
> "Q. Where did the conversation take place between you and Mr. Steele?
>
> "A. In Mr. Steele's office in the bank.
>
> "Q. And you then and there handed him the certificates and powers?

"A. I handed him the certificates and powers and received from him a bank duebill.

"Q. You said Mr. Steele was the buyer?

"A. Yes, sir."

The verdict of the jury under the charge of the court is a distinct finding that the facts testified to by this witness are the actual facts in the case.

Reference has just been made to the distinction between Whitney *vs.* Butler, 118 U. S., 655, and Richmond *vs.* Irons, 121 U. S., 27. It is not necessary to go into a detailed consideration of the facts of each case, because the criterion by which they are distinguished has been pointed out in the opinion of Judge Acheson in Earle *vs.* Coyle, already quoted. It is enough to say that the facts of the case now before the court place it clearly in the same class with Whitney *vs.* Butler, where the shares have been delivered to the cashier or transfer agent of the bank in his official capacity, with instructions to make the transfer, under circumstances where the transferrer had the right to assume that the instructions were followed and the transfer made, and where the failure to make the transfer was a distinct fraud on the transferrer.

This distinction is stated in the opinion of Mr. Justice Matthews, in Richmond *vs.* Irons, *supra*, where the rule in Whitney *vs.* Butler is recognized and reaffirmed.

That the distinction thus recognized in this earlier decision of the Supreme Court is still accepted as the settled law, we refer to the recent opinion of Mr. Justice White in Matteson *vs.* Dent, 176 U. S., 521, published since the trial of these cases, where, in a case where the liability of a stockholder was enforced, in stating the exceptions which have been engrafted upon the general doctrine that the registry of the shareholders is evidence of the liability of those whose names are there entered, the court said:—

"Cases enunciating certain of the exceptions referred to are cited in the following summary:—

"1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments,

such transfer will be disregarded and the real owner be held liable. Germania National Bank *vs.* Case, 99 U. S., 628, 631, 632; Bowden *vs.* Johnson, 107 U. S., 251, 261.

"2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the Acts referred to will operate a transfer on the books, and extinguish the liability as stockholders of the transferrer. Whitney *vs.* Butler, 118 U. S., 655. In the case just cited, in applying the exception, the court very carefully and accurately restated the general rule.

"3. Where stock was transferred in pledge, and the pledgee, for the purpose of protecting his conduct, caused the stock to be put in his name on the books as pledgee, it has been held that such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. Pauly *vs.* State Loan & Trust Co., 165 U. S., 606."

The whole subject is elaborately reviewed in the opinion of the Circuit Court of Appeals for the Fifth Circuit in Snyder *vs.* Foster, 73 Fed. Rep., 136, where the distinction between Whitney *vs.* Butler and Richmond *vs.* Irons is very discriminatingly pointed out, and the court said :—

"Neither of the authorities which we have cited, nor any which we have examined, have favored the theory that a defendant stockholder could be subjected to an absolute liability merely because his name, with this stock untransferred, was found by the Receiver of an insolvent bank, as appears to have been, in this case, in the bank's stock list. * * * What else could or should have been done by a prudent, careful business man, under the state of facts in the pending case, to complete the honest efforts made by Snyder to cease to be in fact, as well as in law, a shareholder in the said bank? In some respects the facts in this case are stronger for Snyder than for the executors of Whitney in the

Whitney-Butler case. That decision did not turn on the form of authority to make the transfer. It seems to have been the purpose of the court in that case to ground the opinion largely, if not entirely, on the broad doctrine that a shareholder in good faith who has done all that a prudent business man should do, will not be held responsible for the neglect and carelessness of an officer of the bank. 'It is of the utmost importance that the liability of stockholders of National banks should be rigorously enforced, but, on the other hand, the court should not treat them with exceptional severity, and apply to their transfers different rules from those which obtain in other business transactions.' Hayes *vs.* Shoemaker, 39 Fed., 319; Young *vs.* McKay, 50 Fed., 394, and cases cited therein."

The same ruling was made in the Circuit Court in New York in Hayes *vs.* Shoemaker, 39 Fed. Rep., 319:—

"Where a shareholder of a National bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the Comptroller of the Currency, under Revised Statutes United States, section 5151, to pay the bank's debts."

So in Young *vs.* McKay, 50 Fed. Rep., 394, it was held:—

"In an action by the Receiver of a National bank to enforce an assessment under Revised Statutes, section 5151, against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal; that he indorsed the same, and requested the broker to inform the cashier of the transaction, and

to have the stock transferred; that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company 'by indorsement hereon and surrender of this certificate.' *Held*, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. Whitney *vs.* Butler, 7 Sup. Ct. Rep., 61, 118 U. S., 655, followed; Richmond *vs.* Irons, 7 Sup. Ct. Rep., 788, 121 U. S., 27, distinguished."

The charge of the learned court below upon the question of what was the nature of the apprehension of liability on the part of the transferrer which would subject the transaction to criticism as a fraud upon the law, is as favorable to the plaintiff as the plaintiff under the law could ask. It is in entire accord with the decisions of this court upon the subject. It cannot be that the general knowledge which every intelligent shareholder has that the law imposes upon the National bank stockholders a double liability, renders a sale of the shares fraudulent as to creditors when that knowledge operates upon the mind of the stockholder in good faith to sell his shares, having no knowledge or suspicion that the bank of which he is a shareholder is embarrassed or likely to become insolvent. The apprehension of impending insolvency must be that which is so clearly pointed out in the charge of the court already quoted—a particular apprehension with reference to the affairs of the bank in which the shares are held.

This is in accordance with the authorities. In National Bank *vs.* Case, 99 U. S., 628, the Receiver of a bank filed a bill against stockholders generally to call an assessment, without regard to certain pretended transfers of the stock. As to some of the defendants, the bill was dismissed; against others, a decree was entered. In that case the Germania Bank

held shares of the Crescent City Bank as collateral. The note which the collateral secured matured, and was not paid. The Germania Bank, as creditor, caused the shares to be transferred into its name, but subsequently retransferred the same to Waldo, one of its clerks. Waldo acquired by the transfer no beneficial interest in the stock. In the opinion, the court said:—

> "It is evident that Waldo held the stock as a cover for the Germania Bank; that, notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee, with the legal title in itself or in its representative, and Phelps, McCullough & Co. (the bank's debtors) were no longer the owners."

After reviewing the law, in which it was held that the registered holder of shares, even though holding the same as collateral, is liable to assessment, Mr. Justice Strong proceeded:—

> "We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers if they are made (as it is called) 'out and out'; that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely a colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the trans-

feree is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, 'but in the event of the company becoming prosperous, the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories.' Williams' Case, Law Rep., 9 Eq., 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; Payne's Case, *Id.*, 223; Kintrea's Case, Law Rep., 5 Ch., 95. See, also, Lindley on Partnership (2d ed.), page 1352; Chinnock's Case, 1 Johns (Eng.) Ch., 714; Hyam's Case, 1 DeG., F. & J., 75; Budd's Case, 3 *Id.*, 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer, with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.' Nathan *vs.* Whitlock, 9 Paige (N. Y.), 152; McClaren *vs.* Franciscus, 43 Mo., 452; Marcy *vs.* Clark, 17 Mass., 329; Johnson *vs.* Laflin, by Dillon, J., 6 Cent. Law Jour., 131.

"The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out-and-out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank."

In Bowden *vs.* Johnson, 107 U. S., 251, the rule is very clearly stated:—

"Where the holder of shares of stock in a National bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the latter in his place, and thus escaping the individual liability imposed by the provisions of section 12 of the Act of June 3d, 1864, chapter 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferrer to them is not thereby affected."

Mr. Justice Blatchford said :—

"The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such holder he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself of it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee."

In Anderson *vs.* Philadelphia Warehouse Company, 111 U. S., 479, in deciding the particular point raised in that case, to wit :—

"That a pledgee of shares of stock in a National bank who, in good faith and with no fraudulent intent, takes

the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure."

Mr. Chief Justice Waite also states the general rule applicable to the question now under consideration:—

"It is well settled that one who allows himself to appear on the books of a National bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. National Bank *vs.* Case, 99 U. S., 628; Bowden *vs.* Johnson, 107 U. S., 251. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

The whole subject is very clearly treated in the opinion of Mr. Justice Field in Johnston *vs.* Laflin, 103 U. S., 800:—

"The transferability of shares in the National banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the

previous transaction. A different doctrine would put a speedy end to the signing of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.

* * * * * * *

"The whole transaction, on the part of Laflin, was free from any imputation of fraud. He sold his shares to a person competent to purchase and hold them, and received the stipulated price. It would be a perversion of justice and of the ordinary rules governing men in commercial transactions to hold the sale, under such circumstances, vitiated by the relations of the purchaser to others, of which the seller had no knowledge, or any grounds to entertain a suspicion. The validity of the sale of stock cannot be made to depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other.

"Of course, the whole case here would be changed if the sale by Laflin had not been made in good faith; but made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank."

The authorities which we have thus presented, were regarded by the Circuit Court of Appeals as conclusive of the question as it was presented to them and we respectfully refer to the

opinion of that court as found on page 65 of the record as a very clear disposition of the assignments of error and argument presented to that court on behalf of the plaintiff in error.

The industry and ingenuity, however, of the learned counsel for the plaintiff in error have presented to this court certain lines of argument which if accepted as applicable to this case would show that not only was this case tried under an erroneous view of the law, but that all the previous decisions of this court and of the various Circuit Courts rested upon a like ignorance.

The fundamental proposition upon which the argument of the plaintiff in error rests is found on page 16 of their brief in these words:—

> "The liability imposed by this act constitutes a contract between the creditors of the bank and the persons who are its stockholders when the debt is contracted."

In so far as the plaintiff in error contends that the double liability of stockholders under the National Banking Act is a contractual liability as distinguished from a penalty, we do not dispute their position, but in so far as it is claimed that the liability is a contract between the creditors of the bank and the persons who are its stockholders when the debt is contracted, we submit that the statement contains a fallacy. The true statement of the rule is that the liability arises out of a contractual obligation, but the contract is a contract between the stockholder and the corporation, made at the time when the stock is taken, and to be enforced, not by the creditors in their own right or on their own behalf, but by a Receiver, in the manner and subject to the conditions prescribed in the National Banking Act, and for the benefit of all concerned. That this is the correct view appears more clearly from the opinion of Mr. Justice Brewer in Whitman *vs.* Oxford National Bank, 176 U. S., 559, where in one of the Kansas corporation stockholder cases, this court referred to the National Banking Act as containing a contractual liability of a character similar to that arising under the Kansas statute, and referring to the National Banking Act, Mr. Justice Brewer said:—

> "Under that Act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising under these undertakings and promises should not have the same force and effect, and be as binding in all other respects as any other contracts of the individual stockholder."

But the distinction between the Kansas stockholder's liability and the liability of stockholders under the National Banking Act is that while in both cases the liability arises out of a contract; under the Kansas statute, the liability may be enforced by individual creditors for their own benefit, while under the National Banking Act it must be enforced by the Receiver for the benefit of all creditors. The Kansas liability is like that of the New York statute, where, in Flash *vs.* Conn, 109 U. S., 371, the right of the creditors to maintain an action at law directly against the stockholder was recognized and enforced; the language of the New York statute being:—

> "All the stockholders of every company shall be severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively;"

while liability under the National Banking Act is akin to the liability under the Oregon statute, as in Patterson *vs.* Lynde, 106 U. S., 519. This was construed by Mr. Chief Justice Waite as a liability not to the creditors, but for the indebtedness.

The language of the National Banking Act is found in Revised Statutes 5151. It is as follows:—

> "The shareholders of every National banking association shall be held individually responsible, equally and

ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

Kennedy *vs.* Gibson, 8 Wallace, 498, is the leading case upon the procedure for the enforcement of this liability. In that case the principal question was, Whether the omission in the bill filed by the Receiver to aver action by the Comptroller enforcing the personal liability of the stockholders precedently to suit being brought by a Receiver was fatal to the bill.

The question having been determined upon demurrer affirmatively in affirming this ruling upon appeal, this court said:—

> "The 50th section of the Act provides that the Receiver, under the direction of the Comptroller of the Currency, shall take possession of the books and assets of every description of the association, collect all the debts and claims belonging to it, and may—proceeding in the manner prescribed—sell, or compound bad and doubtful debts, and sell all its real and personal property; 'and may, *if necessary to pay the debts* of such association, enforce the individual liability of the stockholders.'"
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> * * * * * * * *
>
> "The Receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is not for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot control it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be

enforced, and must precede the institution of suit by the Receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

* * * * * * * *

"The claims of creditors may be proved before the Comptroller, or established by suit against the association. Creditors must seek their remedy through the Comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The Receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

The nature of the liability resting upon stockholders under the National Banking Act has been recently considered in McDonald *vs.* Thompson, 184 U. S., 71. In that case the specific question was, when the Statute of Limitations began to run against the claim, and it was asserted that it did not begin to run so long as there were outstanding claims against the bank, because the right was a right in the creditors. But this theory was rejected by the court and the right of action was held to be a right enforceable only by the Receiver under Revised Statute, section 5234, the court saying:—

"No debt becomes due to the Receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run."

The contention made on behalf of the creditors was repudiated in these words:—

"This would involve a departure from the whole theory of the bill in this case, which is based upon the allegation that the Comptroller of the Currency made an assessment upon the stockholders June 10th, 1893, payable July 10th, from which latter date plaintiff claimed interest."

In the case now before the court, the Receiver has specifically declared upon the same theory that the right of action depends upon the assessment made against the stockholders who in law were such on December 23d, 1897. The plaintiff in error now seeks to avoid recovering upon the allegations in the declaration, and to show a right to recover upon the theory that the assessment is recoverable against the defendant as a stockholder on December 2d, 1897.

So in Studebaker *vs.* Perry, 184 U. S., 258, the provisions of the Revised Statutes with reference to the powers of the Comptroller of the Currency in making assessment are discussed, all the authorities reviewed, and the theory of liability which we have heretofore presented, is fully sustained.

That this is the true theory of the proceedings and was recognized as such by counsel for the plaintiff in error is shown by their averments in the court below. See statement of claim, record page 5.

> "It has become necessary, in order to pay and discharge said contracts, debts, and engagements, to enforce the liability of the shareholders of the capital stock of said Chestnut Street National Bank, as provided by sections 5151 and 5234 of the Revised Statutes of the United States, that therefore the Comptroller of the Currency, who is by law charged with that duty, after having ascertained, determined, and decided that in order to pay said contracts, debts, and engagements of said banking association, an assessment of one hundred (100) per centum upon the par value of each share of the capital stock of said Chestnut Street National Bank is necessary, made an order in writing to that effect, directed to the plaintiff herein, making said assessment payable April 1st, 1898, and pursuant to said order the plaintiff notified each and every shareholder and demanded payment thereof."

And in the same statement the averment is made that the defendant, Susan Carson, on the twenty-third day of September, and for a long time prior thereto, had been a stockholder. At

the trial, plaintiff's counsel, in order to make the necessary proof, offered in evidence a stipulation admitting (Record, page 12)—

> "That the Chestnut Street National Bank was duly incorporated and organized under the laws of the United States as a National banking association; that it transacted a banking business in the city of Philadelphia, in said Eastern District of Pennsylvania, until December 23d, 1897, when suspending payment of its obligations, it was declared insolvent by the Comptroller of the Currency, and that on January 29th, 1898, George H. Earle, Jr., was appointed by the said Comptroller under the laws of the United States, Receiver of said bank, and as such, by direction of the said Comptroller, is plaintiff in these actions in *assumpsit*; and that on or about April 1st, 1898, the said Comptroller, finding it necessary, ordered an assessment of one hundred (100) per cent. of the par value of the capital stock of said bank, and ordered the plaintiff in writing to collect the same equally and ratably from each and every stockholder of said bank, as prescribed by sections 5151 and 5234 of the revised Statutes of the United States."

And so in the notes of testimony, page 13:—

> "It is admitted that Mr. Earle has been appointed the Receiver of the Chestnut Street National Bank, and that the Comptroller of the Currency has made an assessment of one hundred (100) per cent. upon the bank stock."

And in the charge of Dallas, J., the necessity of the defendant being a stockholder at the date when the bank was closed was assumed by the court as admitted on the part of the plaintiff (Record, page 46), where, in charging the jury, the court said:—

> "The question, therefore, in this case is whether Mr. Carson was a stockholder at the time at which there is no question he must have been a stockholder in order that he

should have incurred this statutory liability, and, as I have understood counsel, there is no question about that date, namely, that he must have been a stockholder, in order to have incurred this responsibility, upon December 22d or 23d, 1897. I do not know that the particular day, the difference being only between two consecutive days, is unimportant."

Therefore, under the National Banking Act as construed by the courts, in order that an action at law may be maintained against a stockholder, it is requisite that there be the precedent action of the Comptroller in making the assessment as against the stockholders of record at the date when the bank closed, but in addition to this legal remedy it has been held that one who was a stockholder prior to the closing of the doors of the bank and who wrongfully caused a transfer of his shares after knowledge of impending insolvency may also be held responsible.

Such was the proceeding in Stuart *vs.* Hayden, 169 U. S., 1

That proceeding was in equity, brought by the Receiver against one Stuart who had been a stockholder in a bank which failed, and also against Gruetter & Joers, to whom the shares had been transferred about three weeks prior to the closing of the bank. Stuart had been a director in the bank for eight years prior to the date of the transfer, was a member of its finance committee, and it was found as a fact that on the date when he transferred the shares to Gruetter & Joers, he had knowledge of the then existing insolvency, and falsely represented to Gruetter & Joers that the bank was in a solvent and prosperous condition; that such representation was made for the purpose of inducing Gruetter & Joers to purchase the stock and to enable him, Stuart, to evade and escape his liability as a shareholder for an assessment thereon. The court below entered a decree against Stuart alone, relieving Gruetter & Joers on account of the fraudulent representation made to them by Stuart. The decree of the Circuit Court was reversed by the Court of Appeals in so far as to direct that a decree should be entered not only as against Stuart but also as against

Gruetter & Joers. In the Supreme Court of the United States this decree of the Court of Appeals was affirmed, with the modification that it should be made without prejudice to the right of Gruetter & Joers to protect themselves by proceedings against Stuart.

These decrees are in entire harmony with the principles stated in the cases already cited, and the language of Mr. Justice Harlan, if read in connection with the facts of the case, is also in entire harmony with the principles for which we contend. He says:—

> "The principal inquiry in this case is whether Stuart transferred his stock to Gruetter & Joers in order to escape the liability imposed by statute upon shareholders of National banking associations. His contention is that if the transfer was absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence.
>
> "This construction of the statute seems to find some support in the general language used in a few cases. But it will be found, upon examination, that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition."

This statement of the law is in absolute conformity with the rule for which we contend. It makes the intent of the party with reference to the particular transaction the criterion. Knowledge or reasonable belief upon the part of the trans-

ferrer that the bank was insolvent or in a failing condition is the determining factor.

Further on Judge Harlan says:—

> "If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts, and engagements, the motive with which the transfer is made is, of course, immaterial. But if the bank be insolvent, the Receiver may, at least, without suing the transferee and litigating the question of his liability, look to those stockholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect to its existing contracts, debts, and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.
>
> "The intent with which an act was done may be proved by the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred."

The plaintiff extracts from this quotation the words:—

> "Although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

And seems to regard this quotation as the statement of an absolute proposition of law, whereby the transferrer of shares in a National bank warrants the financial responsibility of his transferree.

We submit that the case, the facts of which have been given, does not justify the conclusion that the court intended to enunciate any such general proposition. The question was not be-

fore the court. There is no case to be found in which any such general proposition has the support of judicial decision. Financial irresponsibility is a fact which may be taken into consideration as a basis upon which to find that particular transfer was made with intent to evade liability by placing the shares in the name of one to whom an assessment would be immaterial. To give to these words the construction which the plaintiff seeks to place upon them would be to introduce into all transactions an element of uncertainty, for every transaction would be subject to review, even though made in good faith, if it subsequently proved that at the date when the transfer was made the bank, if then liquidated, would have proved insolvent, and the transferree, if called upon to pay at that day all his debts, would have been unable to respond. That is the proposition which the plaintiff asks the court to adopt; but we suggest that before so radical a change should be made in the law, as it has heretofore been understood, it is incumbent upon the plaintiff either to show good reason in principle for the same or precedent having more weight than the tortured construction of part of a single sentence read out of connection with the facts upon which the opinion of the court was predicated.

The most natural explanation of the language of Mr. Justice Harlan is that he had in mind the English cases referred to in the opinion of Mr. Justice Strong in Bank *vs.* Case, 99 U. S., 628, in which English cases it had been held that an "out-and-out transfer" to an irresponsible person, with an intent to evade liability of an impending insolvency, would protect the transferrer from subsequent liability if the transfer was in fact made. Such a transfer would be in good faith so far as transferring to such transferree the entire ownership, and is referred to in the English cases as a transfer in good faith because it was in fact an absolute transfer, and in this respect the English cases differ from the American cases, which hold that an absolute transfer to an irresponsible person, known to be such, to evade the stockholder's liability, is ineffective to protect the transferrer. This, it seems to us, is the natural interpretation of the language of Mr. Justice Harlan.

The quotation made in plaintiff in error's brief at page 17 from Hobart *vs.* Johnson, 8 Fed. Rep., 493, might seem to sustain some of their argument, but when read in connection with the question actually before the court, its irrelevancy is perceived. The only question determined by the court in that case was whether a married woman stockholder in a National bank located in New Jersey was free from liability to assessment by reason of her coverture and the provisions of the New Jersey statute which, while enabling a married woman generally to contract as if unmarried, continued her inability as to contracts of accommodation indorser, guarantor or suretyship, and the point determined by the court was that the liabilty of the stockholder was not of that nature.

The point decided in McDonald *vs.* Williams, 174 U. S., 397, cited at page 25 of plaintiff in error's brief, was simply this, that the Receiver of a National bank cannot recover a dividend paid to a stockholder, not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits and when the bank, at the time such dividend was declared and paid, was not insolvent. The opinion of Mr. Justice Peckham, however, is valuable in this, that it points out the difficulties attendant upon determination of the time when insolvency in the broad sense arises. Where there may be no express decision of the question, we submit that the tenor of decisions has been that for the purpose of establishing the date of insolvency *qua* the legal liability of stockholder, the date when actual insolvency is defined by inability to meet maturing obligations and the closing of the doors supervenes, is to be taken.

The industry of the counsel of the plaintiff in error has collated in their brief authorities from several of the State courts construing State statutes. These cases are really of no aid in throwing light upon the present question. The decisions were made upon the construction of statutes not similar to the National Banking Act.

The only cases remaining which require comment are the following. All of these cases are recent decisions in Circuit

Courts enforcing the stockholders' liability under the National Banking Act, and all of them are in harmony with the principles stated to the jury as controlling in the charge of Judge Dallas in this case.

The cases cited were all in equity, but the reference which we are about to make will show their harmony with the principles for which we contend.

In Foster *vs.* Lincoln, 74 Fed., 382, the defendant, the president of a neighboring National bank, in the course of its business had received telegrams indicating financial difficulty in the Lyndon bank, of which he held twenty-five shares. He then, without consideration moving to him, caused his shares to be transferred into the names of his children, one of whom was a married woman and the other two minors. In holding that upon the evidence it should be found as a fact that this transfer was made in contemplation of the insolvency and relief from the double liability, the court said:—

> "As a bank man he must have known of this liability, and he had warning of the straits of the bank by the telegrams six days before the transfer. In these circumstances he must have made the transfer in contemplation of this liability, although he did not know what it would amount to, and hoped, and perhaps expected, it would not amount to, anything."

Cox *vs.* Montague, 78 Fed. Rep., 845, was a suit in equity to set aside the transfer by the appellee to his sister of sixty shares of National bank stock. It was shown that the transferee was irresponsible, and while it was not directly shown that the transferror had actual knowledge of insolvency at the date of the transfer, the court found as a fact that he had good ground to apprehend impending failure, and that the transfer in fact was made with intent to save the liability. Letters signed by the defense, marked confidential, were admitted, in which the defendant admitted his alarm at the condition of the particular bank.

Baker *vs.* Reeves, 85 Fed. Rep., 837. A stockholder in a bank transferred its shares to an irresponsible daughter with-

out any request from her or consideration received. Immediately thereafter the daughter indorsed the certificates and left them with her father for safe keeping. The court, the case being in equity, said :—

> " I am convinced that at the time of making the transfer of stock to his daughter, Mr. Reeves hoped and believed that the bank would survive, and that his present would be a benefit rather than an incumbrance to his daughter ; but the bank was in a failing condition, and there was then ground to apprehend that it would become insolvent and be compelled to go out of business. With this knowledge of its condition, he could not transfer the stock to a person financially irresponsible, and thereby escape the liability of a shareholder for assessments to meet the demands of creditors."

All these cases go upon the ground of the knowledge of the defendant of the impending failure and the intent to avoid the assessment which the law imposed. Such act the court construed to be a fraud on the law, for which equitable relief could be had upon appropriate proceedings in equity.

We have not discussed in detail the remaining assignments of error, although numerous. The counsel for the plaintiff in error in the closing page of the brief say :—

> " Many of the errors assigned have been cured by the verdict, and others are not of sufficient importance to present to this court at this time."

We do not think it proper to dignify with an argument assignments which the plaintiff in error does not think worth while to support.

RICHARD C. DALE,
For the Defendant in Error.

Supreme Court of the United States.

No. 83.—October Term, 1902.

George H. Earle, Jr., Receiver of the Chestnut Street National Bank, Plaintiff in Error, vs. Susan Carson. } In error to the United States Circuit Court of Appeals for the Third Circuit.

[January 19, 1903.]

When the Chestnut Street National Bank of Philadelphia suspended payment and its doors were closed there stood on the stock register ten shares in the name of the defendant in error. A call having been made by the Comptroller for the sum of the double liability, this suit was commenced to recover the amount. The defense was: First, that prior to the suspension of the bank the defendant had in good faith sold the stock standing in her name for a full market price, which had been paid her; second, that, in consummation of such sale, she had, by her agent delivered to the proper officer of the bank in its banking house, at the place where transfers were made, the stock certificate, with an adequate power of attorney to make the transfer, and requested that the stock be transferred; third, that the officer of the bank said that the transfer would be made as requested, and the defendant was ignorant of the fact that the officer had failed to discharge his duty; fourth, that as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder, and was not responsible.

In submitting the case to the jury the court instructed, First, that the presence of the name of the defendant on the stock register created a presumption of liability. This, however, the jury was informed, was not conclusive, but might be rebutted. Such rebuttal, the court charged, would result if it was proven that the defendant had made a *bona fide* sale of her stock, and had, at the proper time and place, handed to the proper officer of the bank a power to transfer the same, although the officer of the bank had neglected to fulfill his duty in the premises. Second, after charging fully and accurately as to the proof essential to show a *bona fide* sale of stock in a national bank, the court having during the trial applied a like rule in passing on the admissibility of evidence, instructed the jury if the evidence established that a sale of such character had been made whilst the bank was a going concern, the defendant would not be liable, because, unknown to her, the bank was, at the time of the sale, in fact insolvent. And the same principle was applied to the un-

known insolvency of the person to whom the stock was sold. There was verdict and judgment for the defendant, which was affirmed by the Circuit Court of Appeals; thereupon this writ of error was prosecuted.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

In the argument at bar all but three of the grounds of error specified in the Circuit Court of Appeals and assigned on the allowance of this writ were expressly waived. In stating the case we have therefore called attention only to the facts and proceedings essential to an elucidation of the three questions now pressed, and hence, disregarding the grounds of error which are obsolete, we come to consider the real issues.

1. Treating the facts as foreclosed by the verdict, the Circuit Court of Appeals held that the trial court rightly instructed that the presumption of liability begotten by the presence of the name on the stock register would be rebutted if the jury found the fact to be that a *bona fide* sale of the stock had been made and that the defendant had performed every duty which the law imposed on her in order to secure a transfer on the registry of the bank. The correctness of this ruling is not open to controversy. (*Matteson* v. *Dent*, 176 U. S. 521; *Whitney* v. *Butler*, 118 U. S. 655.) But, it is urged, the court erroneously assumed the *bona fides* of the sale to have been concluded by the verdict, since the trial court mistakenly refused to instruct the jury that the sale of the stock, though in every other respect lawful, could not be so treated by the jury if, as a matter of fact, it was found that at the time of the sale, to the knowledge of the defendant, the reserve of the bank was below the limit fixed by law. (Rev. Stat. 5191.) To sustain this contention it is argued that by operation of law when the reserve of a national bank falls below the maximum provided in the statute, every transfer of stock made by a person having knowledge of the fact creates a legal presumption of bad faith, and therefore, in the event of the future suspension of the bank, avoids the transaction. But the statute creates no presumption of inability to continue business as a consequence of the reduction of the reserve below the legal requirement. On the contrary, the statute expressly contemplates the continuance of business by a bank, although its reserve may have fallen below the standard, since it merely forbids the making by a bank of certain enumerated transactions during the period when the reserve is impaired. Whether the provisions just referred to are mandatory or directory, we are not called upon to determine, but certainly, in either event, they clearly refute the construction of the statute which would be necessary in order to sustain the proposition. True, the law confers authority on the Comptroller in his discretion to require a bank, whose

reserve has fallen below the legal limit, to restore the reserve within thirty days, and moreover gives power to the Comptroller, with the approval of the Secretary of the Treasury, to appoint a receiver when a bank fails to comply after the thirty days with the demand made. These provisions, however, but add cogency to the view that it cannot be implied that the mere reduction of the reserve below the legal limit, as a matter of law, suspends the business of the bank, or, what would be tantamount thereto, affects, with a legal presumption of bad faith, all transactions made with or concerning the bank during the period whilst the reserve is impaired.

2. The proposition which arises under this head is, that it was erroneously ruled that the insolvency of the bank when the sale of stock was made was irrelevant unless the fact of insolvency was known to the seller and the sale was made to avoid impending liability that is in contemplation of insolvency. It is undisputed that at the date when the stock was sold the doors of the bank were open and it had not failed in business. Hence the proposition is this: Although a national bank has not suspended payment, all sales of its stock, whatever may be the good faith with which they are made, are void if it develops that at the date of the sale the assets of the bank, if they had been then realized on, would have been insufficient to pay its debts. The proposition is supported by what is assumed to be the essential nature of the double liability of a stockholder in a national bank and the time when such liability by operation of law becomes irrevocably fixed. Passing for a moment an analysis of the premises upon which the argument proceeds, let us determine the result to which it necessarily leads. Proceeding to do so, it becomes clear that the effect of maintaining the argument would be to virtually prevent the exercise of the power to transfer stock "like other personal property," which the statute gives in express terms. (Rev. Stat. 5139.) That such would be the result if the validity of every sale of stock depended, not upon the good faith of the seller, but upon the condition of the bank as subsequently developed, is, we think, obvious. Certainly it cannot in reason be said that the power would exist to sell stock like any other personal property if before the power could be exercised the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank. But it has long since been pointed out (*Bank* v. *Lanier*, 11 Wall. 377) that—

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate

representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

"It is in obedience to this requirement, that stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable."

And in the same case (p. 376) attention was called to the fact that the purpose of Congress in making the certificates transferable had been clearly manifested by the repeal, in adopting the national banking act of 1864, of section 36 of the act of 1863, which subjected any transfer of stock in a national bank to debts due to the bank by the seller of the stock. To maintain the proposition, then, would compel us to give an interpretation to the statute which would destroy one of its essential features under the guise of giving effect to another provision of the same statute; in other words, to destroy the law under the pretext of enforcing it. But the controlling principle is, that, when reasonably possible, a statute should be so interpreted as to harmonize all its requirements by giving effect to the whole.

Moreover, when other parts of the statute are brought into view the *reductio ad absurdum* to which the proposition leads is additionally shown Thus, it is provided (Rev. Stat. sec. 5242) that—

"All transfers of the notes, bonds, bills of exchange, or evidence of debt owing to any national banking association, or all deposits to its credit; all assignments of mortgages, sureties on real estate, or all judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, are for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void, . . ."

This by a negative affirmative establishes the validity of all contracts otherwise lawful made by the bank concerning its assets before its failure albeit at the time such contracts were made the bank was insolvent, unless the contracts come within the restrictions which the section imposes—that is, those entered into after the commission of an act of insolvency or in contemplation thereof or made with a view to prevent the application of the assets of the bank in the manner prescribed by law or with the purpose of giving a preference to one creditor over another. If the proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, whilst such limitation would not apply to any other con-

tract concerning the property or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would besides require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act, the provision conferring the power to transfer stock; the one already referred to which avoids contracts made in contemplation of insolvency; the authority conferred upon the Comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it, and the double liability imposed on the registered stockholders, we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact and had sold his stock to avoid the double liability which was impending.

Let us come, however, to consider the matter in the light of authority. It is clear that the assertion that the power to transfer the stock was limited by the unknown insolvency of the bank rests, not upon any express provision of the statute, but is deduced from mere implications which it is deemed must be drawn from the statute as a whole. But the settled rule hitherto enunciated by this court, in accord with the rule obtaining in the English courts, is, that where an express power is given to transfer stock, such power may not be rendered nugatory by implication. This general principle, however, is, by the decisions of this court, subjected to a limitation which does not prevail in England; that is, that the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale. Without undertaking to refer to the numerous cases in which the subject has been variously considered since the adoption of the national-banking act in 1863, we advert to some of the leading authorities.

In *National Bank* v. *Case*, (99 U. S. 629,) the proof concerning the insolvency of the bank was thus stated in the opinion of the court:

"The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed and the bank lost heavily by the failure—nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 4th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest."

As a result of the failure of the bank its doors were closed and suit was brought by the receiver to recover from the Germania the sum of its double liability on one hundred and three shares of stock which had previously stood in the name of the Germania on the stock register of the Crescent Bank. The stock in question had been acquired and registered in the name of the Germania on the tenth day of March, 1873, and the Germania had on the same day caused it to be transferred on the register from its own name to that of Waldo, one of its clerks. The court, in enforcing the liability, said:

"While it is true that stockholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made [as it is called] 'out and out;' that is, completely, so as to divest the transferrer of all interest in the stock. But even in them, it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves there has been no real transfer, 'but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories.' *Williams' Case*, Law Rep. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, Id. 223; *Kintrea's Case*, Law Rep. 5 Ch. 95. See also Lindley on Partnership [second dition], page 1352; *Chinnock's Case*, 1st Johns. (Eng.) chap. 714; *Hyam's Case*, 1 De G. F. & J. 75; *Budd's Case*, 3 Id. 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and to other shareholders, although as between the transferrer and the transferree it was 'out and out.'"

It was decided, however, that it was not necessary to apply the more stringent American rule, since it was found that the transfer under consideration was not real, but was fraudulent and collusive. As from the undisputed facts stated by the court in its opinion, the bank became insolvent in the sense that its assets were unequal to pay its debts in February, 1873,

nearly a month before the alleged sale was made, it follows that everything said in the opinion of the court as to the fraudulent and collusive nature of the transfer, was wholly unnecessary if mere insolvency avoided the sale and affixed the liability. But it clearly appears from the reasoning of the court that the investigation of the question of fraud and collusion was essential because it was deemed that insolvency alone did not avoid the transfer. The ruling, therefore, was directly adverse to the construction of the law now relied upon.

Bowden v. *Johnson*, (107 U. S. 251,) also involved whether a stockholder in a national bank was liable despite a transfer made by him of his stock. It was asserted that he was, first, because he had made the sale with knowledge of the approaching failure of the bank and to avoid the double liability which was impending; and, second, because the sale had been collusively made to a person who was known by the seller to be insolvent and unable to respond to the double liability. The undoubted fact was, although the bank had not suspended, that at the time of the transfer it was insolvent in the sense that its assets were not equal to the discharge of its liabilities. In considering whether the stockholder was liable, the court said:

"As such shareholder he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud, as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock."

Having thus held that there could be no liability if the sale of stock had been made in good faith, and hence excluding the power to avoid the transfer merely because of the insolvency of the bank at the time when the sale was made, the court proceeded to examine the question of good faith and to re-enunciate the principle which had been previously stated in *National Bank* v. *Case*, *supra*. The court said (p. 261):

"But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer."

Answering the contention that even admitting the sale to have been made with knowledge of impending failure to avoid the liability to arise therefrom, it could not be avoided because the sale was intended between the parties to be real, or, to use the expression referred to in *National Bank* v. *Case*, was an out and out sale, the court, in declining to follow the English cases and in adhering to the broader doctrine adverted to in *National Bank* v. *Case*, said: "But it was held by this court in *National*

Bank v. *Case,* (99 U. S. 628,) that a transfer on the books of a bank is not in all cases enough to extinguish liability. The court in that case defined as one limit of the right to transfer that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding as another limit that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by the statute to creditors."

In *Whitney* v. *Butler,* (118 U. S. 655,) the facts were these: A stockholder in the Pacific National Bank of Boston sold his stock on the 8th of November, 1881. Ten days thereafter, on November the 18th, the bank suspended payment and closed its doors. Beyond doubt the bank was insolvent on the 8th of November when the stock was sold, since the Comptroller certified, on the 16th of December, 1881, that the result of his investigation disclosed that "the entire capital stock," amounting to $961,300, had been lost. See statement of facts, *Delano* v. *Butler,* (118 U. S. 638,) which statement was also a part of the record in *Whitney* v. *Butler.* The defense of the stockholder, against whom the double liability was sought to be enforced, was that, having sold his stock and performed every duty required of him to secure a transfer, he was no longer liable, although his name remained upon the register. The court, after expressly stating (p. 658) the good faith of the defendant, because he had no reason whatever "to believe that the bank was insolvent, or was about to become so," and treating the sale as valid for that reason, proceeded to hold that the stockholder was not liable, because he had done everything in his power to secure the transfer, and hence his name remained on the register by the neglect of the officers of the bank. It requires no comment to demonstrate that that case was wrongly decided if the contention now made is sustainable.

In *Stuart* v. *Hayden,* (169 U.S. 2,) the facts were these: Stuart was an owner of shares in the Capital National Bank of Lincoln, Nebraska. He was a director of the bank and a member of its finance committee. On the 22d day of December, 1892, in consequence of contracts made by Stuart with Gruetter & Joers, Stuart delivered to them his certificates of stock, with the power to transfer, and a few days afterwards the stock was transferred. On the 6th of February, 1895, the bank failed. That the bank was insolvent at the date of the sale appears on the face of the opinion, for the court said:

"The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,576.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable on hand amounted to $141,000, of which only $10,000 were worth anything."

The question presented for decision was, whether Stuart continued liable despite the transfer made to Gruetter & Joers. The court elaborately stated the facts, directed attention to the finding by the court below that at the time of the sale the bank was absolutely insolvent, and proceeded to enforce the liability against Stuart solely because, being a director of the bank and a member of its finance committee, he had knowledge of the insolvency, and therefore the sale was in bad faith. Manifestly, this case also reiterates the doctrine announced in the previous cases and excludes the conception that the mere fact of unknown insolvency avoids the transfer, since every word of the careful statement in the opinion on the facts showing knowledge would have been wholly unnecessary if the doctrine now asserted were well founded.

From what has previously been said and the cases just referred to, it is demonstrated that the contention now made is not supported by the statute, and is foreclosed by the decisions of this court. But it is suggested the rule announced in the previous cases is shown to have been a mistaken one by an observation in the opinion in *Stuart* v. *Hayden*, *supra*. The passage referred to (p. 8) is as follows:

"Whether the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

But this remark does not purport to pass upon the question which it suggests, but simply reserves it. The argument, however, is that the opinion would not have reserved a question which had been conclusively foreclosed. The suggestion is based on a misconception of the sentences relied on. Obviously the observations in *Stuart* v. *Hayden* cannot in reason be construed as throwing doubt upon the doctrine announced in the opinion in which the expressions relied on are contained. This would be, however, the case if the significance now attributed to the language were sound. The error of the argument arises from the fact that it affixes to the word insolvency, as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities instead of giving to it its true meaning, that of failure and consequent suspension of business.

3. The proposition under this head is that as the person to whom the stock was sold in the case before us was in fact insolvent, and hence unable to respond to the double liability, the sale was void, although the fact of such insolvency of the buyer was unknown to the seller. But this in its last analysis merely again reiterates the proposition which we have previously disposed of, since it but insists that the validity of the sale of